STATE OF MICHIGAN
IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff/Counter-Defendant-Appellee,

Supreme Court 152994

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity as successor in interest to Michael J. Witucki, a deceased individual,

Court of Appeals No. 322215

Defendants/Counter-Plaintiffs,

Wayne County Circuit Court
Case No. 12 -002767-CK

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.

RESPONSE ON BEHALF OF PLAINTIFF-APPELLEE, EMPLOYERS MUTUAL CASUALTY COMPANY, TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes/Court Rules/Other Authorities

JURISDICTIONAL STATEMENT

Plaintiff-Appellee, Employers Mutual Casualty Company ("EMC"), initiated the instant action by filing a complaint for declaratory relief in the Wayne County Circuit Court against EMC's insureds, Michael Witucki ("Witucki") and Helicon Associates, Inc. ("Helicon"), as well as against Defendants-Appellees - a group of mutual funds that principally invest in tax-exempt municipal securities ("the Trusts"). EMC sought a judicial determination and declaration that no coverage is available under two policies of insurance issued by EMC to Helicon, for the liability imposed upon Helicon and Witucki by the Trusts in the action entitled, *Wells Fargo Advantage National Tax Free Fund, et al v. Helicon Associates, et al*, United States District Court for the Eastern District of Michigan, Docket No. 2:08-cv-15162 ("the underlying action). In an opinion and order entered on May 27, 2014, the circuit court granted EMC's motion for summary disposition. Exhibit A, Order Granting Plaintiff's Motion for Summary Disposition. The circuit court's decision was affirmed by the Court of Appeals in a published opinion issued on December 1, 2015. Exhibit AA, Court of Appeals Opinion. This Court has jurisdiction to consider the Trusts' appeal of the Court of Appeals decision pursuant to MCR 7.303(B)(1) and 7.305(C)(2)(a).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly affirmed the Circuit Court's decision granting EMC summary disposition on the basis that there existed no genuine issue of material fact that the liability imposed by the Trusts upon Helicon and Witucki was excluded under EMC's Linebacker Policy?

Plaintiff-appellee says: "Yes."

Defendants-appellants say: "No."

The circuit court said: "Yes."

The Court of Appeals said: "Yes."

COUNTER STATEMENT OF NEED FOR APPELLATE REVIEW

The Defendant Trusts seek reversal of the Court of Appeals opinion which affirmed the Circuit Court's decision declaring that coverage for the liability imposed by the Trusts upon Helicon and Witucki was excluded under EMC's Linebacker policy of insurance. Both the circuit court and the Court of Appeals' construction of the policy was consistent with Michigan law, properly applying the clear language of both the specific fraud or dishonesty exclusion and the specific Connecticut statute under which liability was imposed. Contrary to the Trusts' prediction that the Court of Appeals decision will wreak havoc and cause irreparable harm to Michigan law, this is simply not true. Every policy of insurance, and every exclusion within those policies of insurance, are construed according to their particular language and applied to the specific facts in each case. The lower courts' construction of this exclusion in this policy, and application of the exclusion to the specific judgment issued in this case, is simply not determinative of the coverage afforded or excluded to the gamut of other possible insureds under other policies of insurance, as predicted by the Trusts. The particular fraud or dishonesty exclusion was unique to a specific type of policy providing, primarily, a defense to claims alleging errors and omissions by public official employees.[1] Moreover, the particular policy form at issue has not been used by EMC since 2008.

[1] Like a linebacker in football backs up the defensive line, the Linebacker policy is designed to "back up" the public official insureds' other lines of coverage and provide a defense for claims alleging errors and omissions by those public officials.

Accordingly, the Trusts' contention that the Court of Appeals decision will affect EMC's or other insurers' future insureds is simply not realistic. [2]

Moreover, even if this Court were to disagree with or question the Court of Appeals' analysis of the particular fraud or dishonesty exclusion, intervention by this Court is simply not warranted because, as the Circuit Court properly concluded, coverage was clearly excluded under the personal profit and the guarantees on bond issues exclusions. In construing and applying these other exclusions, the Circuit Court properly applied Michigan law and refused to sanction the Trusts' attempts to selectively prosecute their action in order to create coverage for the undisputed conduct of Helicon and Witucki - conduct which clearly fell outside the scope of coverage under the Linebacker policy. The Circuit Court properly recognized that the question of coverage under Michigan law is determined by the conduct of the insured and not by the label of the claim the tort claimant chose to proceed under. Regardless of the Trusts' attempts to craft their complaint and to secure a judgment which fell within coverage, no amount of artful pleading could recast the actions, and the resulting liability, of Helicon and Witucki as falling outside of the policy exclusions.

Review by this Court is simply unwarranted and the Trusts' application should be denied.

---

[2] The Trusts reliance upon EMC's current advertisements pertaining to the Linebacker coverage offered is misplaced, if not improper. In addition to these exhibits not being a part of the record in the Circuit Court or the Court of Appeals, they are not representative of any information provided to an insured or potential insured during the policy period at issue.

COUNTER-STATEMENT OF FACTS

This declaratory action was initiated by Plaintiff, Employers Mutual Casualty Company ("EMC") against its insureds, Michael Witucki ("Witucki") and Helicon Associates, Inc. ("Helicon"), as well as a group of mutual funds that principally invest in tax-exempt municipal securities ("the Trusts"). EMC sought a judicial determination and declaration that there was no coverage available under two policies of insurance issued by EMC to Helicon, for the liability imposed upon Helicon and Witucki by the Trusts in the action entitled, *Wells Fargo Advantage National Tax Free Fund, et al v. Helicon Associates, et al*, United States District Court for the Eastern District of Michigan, Docket No. 2:08-cv-15162 ("the underlying action").

The Underlying Action

On December 15, 2008, the Trusts initiated a lawsuit against, *inter alia*, Helicon and Witucki in the United States District Court for the Eastern District of Michigan seeking to impose liability upon Helicon and Witucki under various federal and state securities and "blue sky" laws, as well as under various tort theories. At the time, Helicon was a named insured under a Linebacker Public Officials and Employment Practices Liability Policy ("the Linebacker Policy") and a Commercial Liability Umbrella Policy, issued by EMC to Helicon. Consistent with the primary purpose of the Linebacker policy,[3] EMC provided a defense to both Helicon and Witucki under a strict reservation of rights.

[3] Like a linebacker in football, the purpose of EMC's Linebacker Policies is to "back up" their insureds' other lines and provide a defense to, but not necessarily indemnity from, claims arising from alleged errors and omissions by public official employees.

On September 20, 2011, after EMC had initiated a declaratory action in federal court, and in an apparent attempt to avoid EMC's asserted coverage exclusions, the Trusts dropped their federal claims (the elements of which included fraud) and attempted to remove all other allegations and claims of fraud, leaving only allegations of negligence. Specifically, the First Amended Complaint alleged that Helicon and Witucki violated the security laws of the state of Michigan, Connecticut and Massachusetts, and that Helicon and Witucki were liable for negligent misrepresentation. Exhibit B, First Amended Complaint.[4] The First Amended Complaint sought judgment against Helicon and Witucki for rescission, out of pocket damages, special damages in the form of the future tax-exempt interest income on bonds, prejudgment interest, costs, and attorney fees.[5]

In their First Amended Complaint, the Trusts alleged that, between 2006 and 2007, they purchased over $7 million worth of bonds issued by the Dr. Charles Drew Academy ("Drew"), a public charter school in Ecorse, Michigan. Drew issued the bonds on behalf of

---

[4] All Exhibits to this brief were submitted to the Circuit Court in support of EMC's motion for summary disposition.

[5] The Trusts also sued, *inter alia*, Dorsey and Whitney, a law firm which acted as underwriters' counsel for the bond issue. The Federal District Court dismissed the Trusts' claims against Dorsey and Whitney, concluding that the Complaint failed to state a claim upon which relief could be granted. The Trusts appealed that decision and, on April 2, 2013, the United States Court of Appeals for the Sixth Circuit reversed the dismissal and remanded the case back to the District Court. Exhibit G, *Wells Fargo Advantage Natl Tax Free Fund v. Helicon*, 520 Fed Appx 367 (6th Cir. 2013). On August 5, 2013, the Federal District Court entered a stipulated order stating that any settlement between the Trusts and Dorsey & Whitney or any judgment received by the Trusts against Dorsey & Whitney will be set-off from the judgment against Helicon and Witucki. Exhibit H, Stipulated Order Regarding Setoff and/or Reduction to Judgment Based upon any Settlement or Judgment Issued Against Dorsey & Whitney. In July of 2014, subsequent to the circuit court issuing its opinion in this case, the Trusts submitted to the Federal District Court a status report in which the parties jointly requested that the action be stayed pending resolution of the instant appeal. Exhibit I, Status Report.

another charter school, Crescent Academy ("Crescent"), that sought to purchase a school building in Southfield, Michigan. Helicon operated both schools and Witucki was the principal owner and President of Helicon. Through Helicon, Crescent first leased, and eventually purchased, the school building from SAAS Development, L.L.C. Unbeknown to Crescent and the Trusts, Witucki was a member and General Manager of SAAS, and both he and Helicon profited from the sale of the Crescent building.

The Trusts alleged that, with respect to the bond transaction, Witucki and Helicon directly participated in the creation of the Official Statements, Financial Forecast and Financial Statements, and made false and misleading representations of material facts in those documents, upon which the Trusts relied to their detriment.[6] In 2007, the chartering institutions for both Drew and Crescent issued notices of intent to revoke the schools' charters upon learning of the financing scheme. As a condition of the charters being reinstated, Crescent had to "unwind" the bond issue and the Trusts accepted $3.2 million in newly issued bonds in lieu of their original $7 million investment. Exhibit B.

In an effort to impose liability on Helicon and Witucki under the state securities statutes, the Trusts submitted considerable evidence in the underlying litigation which

[6] The Trusts' First Amended Complaint alleged in great detail how Helicon and Witucki were responsible for the misrepresentations contained in the Official Statements, Financial Forecast and Financial Statements relating to, " . . . the illegality of the Bond issue, violations of the Crescent Academy Charter Contract, the involvement of Drew Academy as a conduit issuer without the approval of its chartering authority, egregious and irreconcilable conflicts of interest, inflated actual student enrollment, inflated maximum student enrollment, the inflated price being paid for the School Building, and the use of so-called 'equipment leases' to conceal historic cash flow problems at Crescent Academy." Exhibit B, First Amended Complaint, ¶5; see also Exhibit B, First Amended Complaint, ¶¶ 24-397.

established that Witucki and Helicon played a significant role in orchestrating the bond transaction and personally benefitted from the transaction. See Exhibit C, the Trusts' brief in opposition to Helicon's motion for summary judgment in the underlying action. Based upon the evidence submitted by the Trusts in the underlying action, the District Court rejected Helicon's and Witucki's defense that they could not be considered "sellers" of securities under Michigan's, Massachusetts', and Connecticut's blue sky laws. Noting that, under *Pinter v. Dahl*, 486 US 622, 644 (1988), a "seller" included one "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner," the District Court concluded that sufficient evidence existed for a jury to conclude that Helicon and Witucki were sellers of the securities at issue:

> No one denies that Helicon had a significant role in the bond issue at the center of this controversy. A Helicon officer, Jeremy Gilliam, made the initial inquiries with Municipal Capital Markets, Inc. ("MCM") about underwriting a bond issue, and negotiated the basic bond terms with MCM. See E-mails of John Grafelman & Jeremy Gilliam, Exs. 12 & 13, ECF No. 199-5. It is also undisputed that Helicon was the primary source of information for the myriad lawyers, consultants, and financiers who prepared documentation and projections for potential purchasers of the bond, including the Preliminary Official Statement and the Official Statement.7 Pls.' Resp. 5, ¶¶ 19–24, 27; Official Statement 6, Ex. 21, pt. 1, ECF No. 200-1. As the company responsible for operating Crescent, Helicon "dictated the agenda" for Crescent board meetings, and the board "never rejected" a Helicon proposal. Nicholson Decl. ¶¶ 6–8, Ex. 16, ECF No. 199-5. Helicon spearheaded the pursuit of the bond issuance and building purchase. Id. at ¶¶ 18–22, 31–32. As such, it was the responsibility of Helicon to obtain approval for the conduit financing scheme from BMCC and CMU prior to authorizing it. Crescent Charter, § 3.10, Ex. 29, ECF No. 200-3 ("[T]he Academy shall obtain prior written permission" for certain financing arrangements); Letter Requesting Consent, Dec. 20, 2006, Ex. 28, ECF No. 200-3. It never received such approval, leading to the Notice of Intent to revoke Crescent's charter in April 2007, the unwinding of the bonds, and the significant losses allegedly suffered by the Plaintiffs. Notice of Intent to Revoke, Ex. 54, ECF No. 200-4.

Witucki's personal involvement in this process was significant. Whenever the various members of the team putting the bond issue together needed information from Helicon, they generally got it from either Witucki or Gilliam. Pls.' Resp. 6, ¶¶ 19–24. On December 11, 2006, Witucki, acting on behalf of Helicon, participated in a teleconference with a number of representatives from the Fund Plaintiffs. 12/11 Transcript at 4–5, Ex. 24, ECF No. 200-3. At that teleconference, Witucki described the projects the bonds would be supporting, and one can reasonably infer that the purpose of making those representations was to ensure Plaintiffs that they could invest in Crescent with confidence. Id. at 25–27, 33–35. Witucki also attended visits of the school site by potential investors, something MCM encouraged because it believed Witucki "s[old] well" to the school's potential creditors. Pls.' Resp. 5, ¶¶ 24–25; E-mails of Jay Hrmotka & Jeremy Gilliam, Ex. 23, ECF No. 200-3; Pynchon Dep. 60:7–9, Ex. 75, ECF No. 201-5. Finally, Witucki signed a certificate on December 20, 2006, on behalf of Helicon, affirming that the information Helicon provided was "true and correct and does not contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements therein . . . not misleading." Certification of Helicon Associates, Inc., ¶ 8, Ex. 20, ECF No. 199-5. Defendants characterize these activities as "providing information," rather than "urging" a purchase, but that distinction is very much in the eye of the beholder, and as such, it is a question for a duly impaneled jury.

A reasonable juror could also conclude that Helicon and Witucki benefitted handsomely from the bond issue. The primary goal of the Crescent bond issue was to generate funds so the Drew Academy could purchase a school building from SAAS — a company that Witucki led as "general manager" — for $5 million. Offer to Purchase, Ex. 8, ECF No. 199-5. This was significantly more than the building's appraised value of $4.37 million. Appraisal Letter 3, Ex. 15, ECF No. 199-5. While the bond issue documents disclose SAAS as the seller of the building, they do not disclose this conflict of interest. The bond proceeds also went to pay off certain "equipment leases" Crescent took out from Helicon, which Plaintiffs claim were actually short-term loans designed to hide Crescent's underlying cash flow problems. See Master Equipment Lease Agreement 15, June 23, 2005, Ex. 47, ECF No. 200-4 (giving Crescent an extra $10,486.84 per month in cash flow); Master Equipment Lease Agreement 15, June 27, 2006, Ex. 50, ECF No. 200-4 (providing another $15,325.91 per month in funds).

Under the final bond agreement, Helicon directly received 1.5% of the $7,090,000 face value of the bond, or $106,350, as a "financial services fee" for assisting Crescent in the financing process. Delivery, Settlement, &

> Closing Procedures 3, Ex. 30, ECF No. 200-3. It also received an additional $702,258.64 to go towards "payoff of a capital lease," ie, the "equipment leases" it made with Crescent. Id. Moreover, Helicon and Witucki received additional, direct payments of $135,745.00 and $342,133.02, respectively, from the funds being used to purchase the building because of their involvement with SAAS. Fund Disbursement Sheet, Ex. 31, ECF No. 200-3.
>
> * * *

Exhibit D, Order Denying Helicon and Witucki's Motion for Summary Judgment, pages 12-15. In addition, the District Court concluded that the record evidence was sufficient to establish that Helicon and Witucki "materially assisted" a violation of the Connecticut security law because they were "instrumental in bringing about the actual transfer of title to the [Trusts] by their activities and representations during their development of the bond issue." Exhibit D, pages 21-22.

Following the District Court's denial of summary judgment to Helicon and Witucki, the District Court entered a judgment in favor of the Trusts and against Helicon and Witucki under the Trusts' Connecticut Securities Act claim, in the aggregate amount of $3,387,526. Exhibit E, April 25, 2012 Judgment and Order of Dismissal. The judgment[7] specifically stated that liability was imposed on Helicon and Witucki pursuant to Section 36b-29(a)(2) of the CUSA, which provides, in pertinent part:

> (a) Any person who . . . (2) offers or sells or materially assists any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements

[7] The document is titled "Judgment and Order of Dismissal" and states that final judgment was entered in favor of the Trusts and against Helicon and Witucki on the Trusts' Connecticut Securities Act. The judgment goes on to specify the amount that each Trust was awarded " . . . pursuant to Section 36b-29(a)(2) of the Connecticut Uniform Securities Act." Notably, the judgment does not contain a statement by Helicon or Witucki denying any wrongdoing.

> made, in the light of the circumstances under which they are made, not misleading, who knew or in the exercise of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight per cent per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.

Conn Gen Stat §36b-29. The Trusts thereafter filed motions for attorney fees and, on November 20, 2012, the District Court entered an order granting the Trusts an additional $873,810.70 in fees and $67, 905.50 in costs. Exhibit F, November 20, 2012 Order.

This Declaratory Action

EMC initiated this action, seeking a judicial determination that no coverage was available for the judgment rendered against Helicon and Witucki in the underlying action.[8] As pled in the complaint, EMC issued the Linebacker Policy and the Umbrella Policy,[9] to

[8] The Trusts initially sued Jeremy Gilliam in the underlying action as well. EMC initially provided a defense to Gilliam but, upon determining that Gilliam was an independent contractor and not an employee of Helicon, EMC withdrew its defense of Gilliam in the underlying action. The District Court stayed the action as to Gilliam due to his bankruptcy. No judgment was ever entered against Gilliam in the underlying action. Gilliam never answered the complaint in this matter and EMC entered a default against him.

[9] The parties do not dispute that, pursuant to the language in the Umbrella Endorsement, if coverage for the liability imposed upon Helicon and Witucki is excluded under the Linebacker Policy, coverage is also excluded under the Umbrella Policy.

Helicon for a period of insurance of December 16, 2007 to December 16, 2008.[10] The Linebacker Policy provided the following coverage, subject to any applicable exclusions:

> We will pay "Loss" and/or "Defense Expenses" to which this insurance applies excess of the deductible stated in the Declarations, provided that:
>
> 1. The "wrongful act" on which the claim is made is based occurs on or after the "retroactive date" shown in the Declarations and not after the end of the policy period; and
> 2. The claim is first made against any past, present or future "insured":
>
> a. during the policy period, or
> b. if Extended Reporting Period applies, during that period (see Section F).

Exhibit J, Linebacker Policy, Part I - Coverage, Section A - Agreement. The policy defined a "wrongful act" as follows:

> K. "Wrongful Act" means any of the following:
>
> 1. Actual or alleged errors;
>
> 2. Misstatement or misleading statement;
>
> 3. Act or omission or neglect or breach of duty by an insured in the discharge of "organizational" duties.
>
> * * *

Exhibit J, page 4 of 8.

---

[10] The brochure and website information attached to the Trusts' application as Exhibits F and H, respectively, were not a part of the circuit court or Court of Appeals record in this case. In any event, the exhibits are not representative of information or advertising provided to any insured or potential insured in 2007/2008. In fact, the Linebacker Policy form at issue in this case, has not been used by EMC since 2008.

The parties did not dispute that both Helicon and Witucki were "insureds" under the Linebacker Policy. The Linebacker Policy contained the following relevant exclusions:

> This policy does not apply to:
>
> A. "Wrongful Acts" based upon or attributable to an "insured(s)" gaining any personal profit or advantage to which an "insured(s)" is not legally entitled.
>
> B. The return of any remuneration paid to an "insured" if such payment is held by the courts to be in violation of the law.
>
> C. Any action brought against an "insured" if by judgment or adjudication such action was based on a determination that acts of fraud or dishonesty were committed by the "insured."
>
> * * *
>
> P. Any "wrongful act" of an "insured" in connection with:
>
> 1. Any tax assessment or adjustments, or
>
> 2. The collection, refund, disbursement or application of any taxes, or
>
> 3. Failure to anticipate tax revenue shortfalls.
>
> 4. Guarantees on bond issues.

Exhibit J, Section III - Exclusions.

EMC filed a motion for summary disposition seeking a judicial determination and declaration that there is no coverage available under the two policies of insurance issued by EMC to Helicon, for the liability imposed upon Helicon and Witucki by the Trusts in the underlying action.[11] Specifically, EMC argued that coverage for the liability imposed upon

[11] Helicon filed a counter-claim against EMC seeking a declaration of coverage in its favor and also alleging a claim of bad faith breach of the insurance contract. EMC sought summary

Helicon and Witucki was specifically excluded under four exclusions: (1) the personal profit exclusion; (2) the guarantees on bond issues exclusion; (3) the return of remuneration exclusion; and (4) the fraud or dishonesty exclusion. Two hearings were held on EMC's motion: the first on June 27, 2013 (Exhibit K, transcript of June 27, 2013 hearing) and the second on February 18, 2014 (Exhibit L, transcript of February 18, 2014 hearing).

In an opinion and order entered on May 27, 2014, the circuit court granted EMC's motion for summary disposition, concluding that coverage for the liability imposed by the Trusts upon Helicon and Witucki was excluded under the personal profit exclusion, the guarantees on bond issues exclusion, and the fraud or dishonesty exclusion. Exhibit A, Order Granting Plaintiff's Motion for Summary Disposition.

The Trusts' Appeal

The Trusts appealed the Circuit Court's decision to the Court of Appeals. On December 1, 2015, the Court of Appeals affirmed the Circuit Court's decision in a published opinion. Exhibit AA. The Court of Appeals concluded that the fraud or dishonesty exclusion precluded coverage, and declined to decide the applicability of the other asserted exclusions. The Court rejected the Trusts' contention that a consent judgment could not satisfy the terms of the fraud or dishonesty exclusion, noting that, once entered, a consent judgment is treated, for all intents and purposes, as a judgment. The Court then addressed the fact that the judgment entered against Helicon and Witucki was specifically premised on §36b-29(a)(2)

---

disposition of the counter-claim and an order dismissing the bad faith claim against EMC was entered on March 3, 2013. Helicon did not appeal that decision.

of the CUSA and that, based upon the language of that statute, they committed acts of dishonesty:

> Witucki and Helicon assisted in the offering and sale of bonds to the Funds without the proper authority, resulting in a substantial loss in the value of the investment when the bonds were required to be reissued. Pursuant to the plain language of the above statute, the consent judgment, by finding a violation of that statute, necessarily found that Witucki and Helicon made "untrue statement[s] of material fact" or "omission[s] to state a material fact." The word "dishonest" is defined in *Black's Law Dictionary* (10th ed) as "Deceitfulness as a character trait; behavior that deceives or cheats people; *untruthfulness*; untrustworthiness" (emphasis added). Because statements and representations comprised the statutory violation, they committed acts of fraud or dishonesty within the meaning of the policy exclusion.

Exhibit AA, slip op page 3-4.

The Court rejected the Trusts' argument that, if the fraud or dishonesty exclusion were construed as applying to exclude the liability imposed upon Helicon and Witucki under the judgment, coverage under the policy would be illusory:

> Simply put, we are at a loss to comprehend how an exclusion based on "acts of fraud or dishonesty" renders the policy or coverage illusory absent an argument that fraud or dishonesty is intrinsically necessary to Helicon's and Witucki's operations, which we do not accept. Mere negligence will not trigger the exclusion. Hence, the coverage cannot be construed to be illusory because situations exist or could occur that will permit recovery.

Exhibit AA, slip op page 4.

STANDARD OF REVIEW

On appeal, the Trusts claim that the circuit court erred in granting EMC summary disposition pursuant to MCR 2.116(C)(10) and that the Court of Appeals erred in affirming that decision. This court reviews the grant or denial of a motion for summary disposition *de novo*. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

ARGUMENT

Introduction

EMC initiated this declaratory action seeking a judicial determination that it owed no duty to its insureds, Helicon and Witucki, to indemnify them for the liability imposed upon them by the Trusts as a result of both Helicon's and Witucki's self-dealing, dishonest and indisputably improper conduct managing a charter school. Despite the Trusts' attempts to draft their pleadings and craft their claims so as to create coverage under the policy of insurance, the lower courts properly construed and applied the terms of the policy to the undisputed tortious conduct of Helicon and Witucki - conduct which the Trusts themselves proved and upon which the judgment was specifically based - and correctly concluded that no coverage was available. The Court of Appeals decision properly concluded that the liability imposed upon Helicon and Witucki was excluded under the policy's fraud or dishonesty exclusion. Moreover, as properly determined by the circuit court, other exclusions in the policy excluded coverage and EMC was entitled to summary disposition in its favor.

Governing Legal Standard

An insurance policy is a contract to which well-settled principles of construction apply. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). As a contract, an insurance policy must be read as a whole to discern and effectuate the parties' intent. *Id*. Accordingly, an insurance contract must be enforced in accordance with its specific terms. *Id*. To give effect to the parties' intent, a contract must be interpreted

"according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Farm Bureau Mutual Ins. Co. v Stark*, 437 Mich 175, 181; 468 NW2d 498 (1991) overruled on other grounds in *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (citations omitted). Where the terms employed are not ambiguous, a court may not create an ambiguity where none otherwise exists. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 568; 596 NW2d 915 (1999).

In addition to these general insurance contract construction principles, an exclusionary provision contained in insurance contracts is strictly construed in favor of the insured. *McGuirk v Meridian Mutual Ins Co*, 220 Mich App 347, 353; 559 NW2d 93 (1996). However, clear and specific exclusions must be given effect lest an insurance company become liable for a risk that it did not assume. *Id*. "Exclusions limit the scope of coverage provided and are to be read with the insuring agreement and independently of every other exclusion." *State Farm Mutual Auto Ins Co v Roe (On Rehearing)*, 226 Mich App 258, 263; 573 NW2d 628 (1997).

I. Neither the Court of Appeals nor the Circuit Court reversibly erred in concluding that coverage for the liability imposed by the Trusts on Helicon and Witucki was excluded under the fraud or dishonesty exclusion.

The Linebacker Policy excluded coverage for any action based upon fraud or dishonesty on the part of the insured:

> C. Any action brought against an "insured" if by judgment or adjudication such action was based on a determination that acts of fraud or dishonesty were committed by the "insured".

Exhibit J. The judgment did not contain any statement by Helicon or Witucki disavowing any wrongful conduct and it specifically stated that liability was imposed on Helicon and Witucki pursuant to Section 36b-29(a)(2) of the CUSA, which provides, in pertinent part:

> (a) Any person who . . . (2) offers or sells or materially assists any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, who knew or in the exercise of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight per cent per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.

Conn Gen Stat §36b-29. The lower courts properly concluded that coverage was excluded under the policy because the action brought against Helicon and Witucki resulted in a judgment specifically holding Helicon and Witucki liable the statute which, based upon the very language of that statute, necessarily determined that they committed acts of dishonesty.

Moreover, the facts established by the Trusts in the Federal District Court established that, under the Connecticut statute, Helicon and Witucki were both a "seller" and "materially assisted" the sale under the Act based upon their actions and representations in connection with the bond issue. While the Trusts amended their complaint in an apparent attempt to remove any allegations of fraud, the lower courts properly concluded that there existed no genuine issue of material fact that the liability imposed upon Helicon and Witucki was by virtue of the judgment, was based upon a determination that Helicon and Witucki committed

the statutory acts of dishonesty. Despite the Trusts' attempts to artfully plead a claim which was covered under the policy - i.e., negligent misrepresentation and violations of those state securities statutes which do not require proof of fraud - EMC's duties under the policy of insurance are not controlled by the labels or language chosen by the tort plaintiffs. *Michigan Educational Employees Mut Ins Co v Karr,* 228 Mich App 111, 113; 576 NW2d 728 (1998) (Michigan courts examine the conduct underlying the lawsuit, rather than the legal theories or labels attached to the conduct). "[I]t is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists." *Allstate Ins Co v. Freeman,* 432 Mich 656, 662-663; 443 NW2d 734 (1989) (citation omitted). See also *White v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals (Docket No. 265380, March 16, 2006) (attached as Exhibit P), citing *Shuler v. Michigan Physicians Mut Liability Co,* 260 Mich App 492, 527; 679 NW2d 106 (2004), for the principle that the determinative question in coverage actions is not whether the claim is labeled as one of medical malpractice or one of negligence but, rather, whether the challenged conduct falls within the scope of the policy's exclusion.

Looking beyond the labels and phrases chosen by the Trusts, there existed no genuine issue of material fact that the judgment imposed liability on Helicon and Witucki under the CUSA based upon a determination that Helicon and Witucki had engaged in, at a minimum, dishonest acts.[12] *Random House Webster's Unabridged Dictionary* (2nd ed 2001) defines

[12] Regardless of the Trusts' efforts to remove all reference to the word "fraud" in its amended complaint, the exclusion applies whether the acts at issue are fraudulent **or** dishonest. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 69; 535 NW2d 529 (1995) (the term "or" is generally construed as referring to an alternative or choice between two or more things).

"dishonest" as "not worthy of trust or belief." *Black's Law Dictionary* (10th ed) defines "dishonest" as "Deceitfulness as a character trait; behavior that deceives or cheats people; untruthfulness; untrustworthiness." The record evidence established by the Trusts in the underlying action established that Witucki and Helicon undertook great efforts and made numerous representations to the Trusts in order to secure their investment in the bonds, all without disclosing Witucki's significant interest in SAAS and the fact that he (and therefore Helicon) would profit handsomely from receipt of the bond proceeds. Further, the Trusts established that Helicon and Witucki knew that, under Crescent's charter, Bay Mills (Crescent's chartering agency) was required to approve the bond transaction, and knew that Bay Mills had not given such approval.[13] The Trusts alleged and established that Helicon and Witucki were aware of the fact that the representations contained in the Official Statements, Financial Forecasts and Financial Statements - representations which Helicon and Witucki controlled - were untrue, that Helicon and Witucki grossly inflated the lease rate and sale price of the school building, and that Helicon and Witucki caused Crescent to disguise over $700,000 of cash-flow discrepancies as equipment leases.[14] At a minimum, Helicon's and Witucki's actions in soliciting and orchestrating the bond issue, permitting the

[13] See Exhibit C - Direction Letter (attached as Exhibit 28 to the Trusts' summary judgment pleadings); 2004 deposition of Patrick Shannon (attached as Exhibit 29 to the Trusts' summary judgment pleadings); Nicholson declaration (attached as Exhibit 16 to the Trusts' summary judgment pleadings); 2011 deposition of Patrick Shannon (attached as Exhibit 71 to the Trusts' summary judgment pleadings); deposition of Jay Hromatka (attached as Exhibit 76 to the Trusts' summary judgment pleadings); and deposition of Leonard Rice (attached as Exhibit 73 to the Trusts' summary judgment pleadings)

[14] See Exhibit B, First Amended Complaint, ¶¶ 56, 59, 64-68, 69-73, 74-87, 115-122, 123-160, 177-202, 208-216, 233-241; Exhibit D.

violation of Crescent's charter contract, involving Drew Academy as a conduit issuer without the approval of its chartering authority, engaging in egregious and irreconcilable conflicts of interest, inflating actual and maximum student enrollment, inflating the price paid for the school building, and orchestrating and profiting from the 'equipment leases' in order to conceal historic cash flow problems at Crescent - all conduct for which the judgment under the CUSA was imposed upon Helicon and Witucki - were dishonest.

The case authority relied upon by the Trusts, in addition to being non-binding authority in Michigan, is distinguishable. These cases[15] opine on the nature and extent of an insurer's duty to defend its insured against actions which involve claims of fraud or dishonesty as well as claims which do not. Contrary to the posture of this action, where EMC defended Helicon and Witucki against all of the Trusts' claims, the cases cited by the Trusts did not involve a determination of coverage for a judgment imposing liability under a statute which specifically included dishonest conduct as an element but, rather, involved the insurer's duty to defend its insured under circumstances where liability could potentially be imposed for conduct which did not involve fraud or dishonesty.

The Trusts' reliance on *Wojtunik v Kealy,* 2011 WL 1211529 (D. Ariz. 2011) (attached as Exhibit G to the Trusts' application) is equally misplaced as the facts in that case are distinguishable. In *Wojtunik, supra*, the policy excluded an insured's "deliberate fraudulent act" but not dishonesty. Moreover, the consent judgment at issue was determined, at least

[15] *Cent Power Sys & Servs, Inc v Universal Underwriters Ins Co*, 49 Kan App 2d 958, 969; 319 P3d 562, 570 (2014); *Jensen v Snellings*, 841 F2d 600, 615 (5th Cir 1988); and *Clarendon Nat Ins Co v Vickers*, 265 F App'x 890, 891 (11th Cir 2008).

in part, not to be an adjudication of the insured's deliberate fraudulent acts because the judgment specifically stated that the insured did not concede that they had committed any wrongful act. The judgment against Helicon and Witucki contained no such statement or similar denial of dishonest conduct.

Finally, the Court of Appeals properly rejected the argument that its construction and application of the exclusion to Helicon's and Witucki's undisputed conduct rendered coverage under the policy illusory. Coverage is not illusory because, the exclusion does not preclude coverage for an action brought against an insured which, while arising out of errors or misstatements or neglect by the insured, is not based upon acts of fraud or dishonesty. As noted by the Court of Appeals, the policy provided coverage for Helicon and Witucki's operations so long as their acts were mere errors, misstatements or neglect, but not for acts which were fraudulent or dishonest as the record evidence clearly established were the acts upon which the Trusts' judgment was based in this case.

II. Even if this Court were to question the applicability of the fraud or dishonesty exclusion, EMC was properly granted summary disposition on the basis of the other exclusions.

While not argued to this Court, the Trusts cannot dispute that EMC was entitled to judgment in its favor if any of the asserted exclusions applied. In addition to finding that the fraud or dishonesty exclusion applied, the circuit court also held that coverage was excluded under the personal profit and the guarantees on bond issues exclusions. EMC also argued that the return of remuneration exclusion precluded coverage. The Court of Appeals only addressed the fraud or dishonesty exclusion. For the reasons discussed below, it is EMC's

position that, even if this Court were to question the Court of Appeals construction of the fraud or dishonesty exclusion, review is not warranted in this case as the other exclusions clearly precluded coverage and the Trusts are not entitled to the relief they seek.

A. As determined by the Circuit Court, coverage for the liability imposed by the Trusts on Helicon and Witucki was excluded by under the personal profit exclusion.

The Linebacker policy contains the following personal profit exclusion:

> This policy does not apply to:
>
> A. "Wrongful Acts" based upon or attributable to an "insured(s)" gaining any personal profit or advantage to which an "insured(s)" is not legally entitled.

Exhibit J. Michigan appellate courts have addressed the personal profit exclusion in two instances: *Unionville-Sebewaing Area Schools v MASB-SEG Property Casualty Pool, Inc*, unpublished per curiam opinion of the Court of Appeals (Docket No. 242084, January 29, 2004) (attached as Exhibit M), and *Yale Public Schools v MASB-SEG Property Casualty*, unpublished per curiam opinion of the Court of Appeals (Docket No. 250053, December 14, 2004) (attached as Exhibit N). In both of these cases, the Court of Appeals cites to and adopts the reasoning of a Fifth Circuit Court of Appeals case, *Jarvis Christian College v National Union Fire Ins Co of Pittsburgh, Pennsylvania*, 197 F3d 742 (5th Cir 1999) (attached as Exhibit O), which held that a personal profit exclusion nearly identical to that at issue in this case was enforceable and operated to exclude coverage for liability imposed upon an insured who had gained either a profit or an advantage to which he was not legally entitled.

In *Jarvis,* a trustee of the plaintiff college, Jerrell J. Cosby ("Cosby"), recommended that the college invest $2 million of its endowment funds in a company called Action Funding, Inc. Cosby did not disclose to the board of trustees or the finance committee that Cosby had a 49% ownership interest in, and was a director and salaried employee of Action Funding, Inc. The college transferred the $2 million in endowment funds to Action Funding and Action Funding, in turn, bought accounts receivable from hospitals and health care providers at a discounted rate, with plans to collect the debts at face value at a later time. When the hospitals and healthcare providers filed for bankruptcy, Action Funding was unable to collect the debts and was unable to fulfill its promissory note obligation to Jarvis. Jarvis filed suit against Cosby and Action Funding.

After a jury returned a verdict in favor of Jarvis and against Cosby, concluding that Cosby had breached both the duty of care the duty of loyalty he owed to Jarvis, Jarvis sought to collect the judgment from its insurer under its errors and omissions policy. The insurer denied coverage citing, *inter alia*, a personal profit exclusion which excluded coverage as to "any claim arising out of the gaining in fact of any personal profit or advantage to which the Insured is not legally entitled." *Jarvis, supra* at 747. Jarvis initiated a declaratory action and the trial court held that coverage for the liability imposed on Cosby was precluded under the personal profit exclusion contained in the insurance policy. Jarvis appealed that decision to the 5th Circuit Court of Appeals and the Fifth Circuit affirmed, concluding that, even if Cosby had not gained a profit, the evidence established that he had gained a distinct business advantage from orchestrating the influx of $2 million into his own business. Finally, the

court concluded that Cosby was not legally entitled to gain the profit or advantage because he had breached his fiduciary duty to Jarvis in doing so.[16]

As in *Jarvis*, the circuit court properly concluded that there existed no genuine issue of material fact that the underlying judgment rendered against Helicon and Witucki was excluded under the personal profit exclusion. The Trusts established in the underlying action that Witucki and Helicon gained a personal monetary profit in the form of financial services fees, payoff of equipment leases, as well as direct payments of nearly $500,000.00 from the bond agreement.[17] Further, as in *Jarvis*, Witucki and Helicon gained a distinct business advantage from the bond transaction by virtue of the influx of money into SAAS - a business which Witucki was a member and manager of.[18] As Witucki and Helicon's actions were established to be in violation of the Connecticut statute, as in *Jarvis*, there existed no genuine issue of material fact that Helicon and Witucki were not legally entitled to the profit and advantage they gained from the bond transaction. As such, there existed no genuine issue

---

[16] In so holding, the Court rejected the insured's argument that his conduct was not "illegal," noting that the exclusion required only that the insured not be "legally entitled" to the profit or advantage and that the two terms were not synonymous. *Id* at 749-750.

[17] Importantly, as properly recognized by the circuit court in this case, the exclusion applies to any personal profit or advantage to which *an* insured is not legally entitled. Under Michigan law, *Allstate Ins Co v Freeman*, 432 Mich 636, 692-695 (1989), the exclusion necessarily must be construed to preclude coverage when *any* insured gains a personal profit or advantage to which he is not legally entitled. Accordingly, even if the Trusts had attempted to argue that only Witucki, but not Helicon (or vice versa), gained a personal profit or advantage, the exclusion would nevertheless bar coverage because "an" insured did gain personal profit and advantage to which he/it was not legally entitled.

[18] The Trusts established in the underlying action that, after receiving the $5 million purchase price when the bonds were issued, and after paying off all of the mortgages, fees, and partner loans, SAAS still had about $1.4 million to distribute to its investors. See SAAS Payout (attached as Exhibit 31 to the Trusts' summary judgment pleading in the underlying action, see Exhibit C).

of material fact that coverage for the liability imposed upon Helicon and Witucki was excluded under the personal profit exclusion contained in the policy and the circuit court properly granted summary disposition to EMC.

On appeal, as it did in the circuit court, the Trusts argued that the personal profit exclusion cannot be construed as precluding coverage in this case because "the underlying judgment" was not based upon or attributable to Helicon or Witucki gaining any personal profit or advantage. The Trusts argued that, to succeed in establishing liability against Helicon and Witucki under the CUSA, the Trusts did not need to establish that the disbursements from the bond transactions were illegal. The Trusts' argument fails for a number of reasons. First, it is not "the underlying judgment" which must be based upon or attributable to an insured gaining any personal profit or advantage. Rather, the language of the policy excludes coverage when the *wrongful acts on which the claim is made* are based upon or attributable to an insured gaining any personal profit or advantage. The wrongful acts upon which the Trusts' claim was made (and for which judgment was rendered under the CUSA) were Helicon and Witucki's actions in successfully soliciting the purchase of the bonds, by making assurances as to the financial viability of Crescent Academy and the Trusts investment in the bonds, motivated at least in part by a desire to serve Helicon's and Witucki's own financial interests. These wrongful acts rendered Helicon and Witucki a seller or offerer of the bonds for purposes of imposing liability under the CUSA and these wrongful acts were necessarily excluded under the policy because these wrongful acts were

based upon or attributable to Helicon and Witucki gaining a personal profit or advantage to which they were not legally entitled.

Further, the Trusts' argument also fails because it relies upon non-Michigan cases which are significantly distinguishable. The Trusts primarily relied on the decision of *Alstrin v St Paul Mercury Ins Co*, 179 F Supp 2d 376 (D Del 2002), in arguing that the personal profit exclusion does not apply. However, the policy at issue in *Alstrin* is markedly different from the policy at issue in this case. In *Alstrin*, the directors and officers' liability policy specifically granted coverage for securities fraud claims, with the Court noting that "securities fraud claims are among the most common claims filed against directors and officers . . ." However, the linebacker policy at issue in this case was issued to a corporation which ran charter schools, not a corporation or individual engaged in securities transactions as a matter of course. Securities fraud claims are decidedly not among the most common claims expected to be filed against a corporation like Helicon and there is simply no basis for construing the policy of insurance issued to Helicon as providing a similarly broad grant of coverage for securities fraud claims.

Moreover, the language of the profit exclusion at issue in *Alstrin* employed the terms "*any profit* or advantage", whereas the language at issue in this case is "any *personal* profit or advantage". In construing that profit exclusion, the *Alstrin* Court was mindful of the fact that the policy of insurance provides ". . . an explicit and broad grant of coverage for securities fraud claims", *Id* at 396, and construed the exclusion so as not to eviscerate the coverage granted for such claims (which necessarily involve the insured gaining *some* profit).

The policy at issue in this case did not provide a broad grant of coverage for securities fraud claims and did not exclude all profit gained by an insured. Rather, the policy excluded coverage for wrongful acts which are based upon or attributable to an insured gaining any *personal* profit or advantage to which an insured is not legally entitled - a fact which indisputably was established in the underlying action.

The Trusts argued that, because the underlying judgment in *this case* involved securities, the policy of insurance should be interpreted in a manner consistent with securities law. However, the nature of the underlying claim is irrelevant to the proper construction of the policy. It is axiomatic that the language of an insurance policy is to be interpreted according to the words' plain meaning and common usage. *Twichel v. MIC Gen. Ins. Corp,* 469 Mich 524, 534 (2004) (citing *Allstate Ins. Co. v. McCarn,* 466 Mich 277, 280 (2002)). The Trusts' argument that the terms of the policy should be interpreted in accordance with securities law is contrary to Michigan law. *Radenbaugh v Farm Bureau Ins Co of Mich*, 240 Mich App 134, 138 (2000) (language should be given its ordinary and plain meaning, and technical and strained constructions should be avoided). Indeed, if one were to accept the Trusts' position, the construction of the policy exclusions and the words contained therein would be different with each claim made against the policy - a result which cannot be sustained under Michigan law.

Finally, the Trusts argued that, unless the policy terms are defined and the exclusions are construed so as to afford coverage for their claim, *no* coverage could ever be available under the policy and it is therefore, illusory. However, the fact that the Trusts' claim in this

case is excluded does not render the policy illusory. Under this Court's decision in *Ile v Foremost Ins Co*, 493 Mich 915 (2012), a policy will not be considered illusory if there is *any* manner in which the policy could be interpreted to provide coverage. The coverage afforded under the policy is not illusory because the language of the applicable exclusions can be interpreted as providing coverage under certain factual circumstances - just not under the facts of this case. For example, where an insured makes false representations which subject him to liability, but which are not based upon or attributable to him gaining a personal profit or advantage to which he is not legally entitled, the personal profit exclusion would not exclude coverage.[19] As such, the policy is not illusory because it does provide coverage under certain factual circumstances not present in this case and the Trusts' arguments to the contrary are without merit.

B. As determined by the Circuit Court, coverage for the liability imposed by the Trusts on Helicon and Witucki was also specifically excluded under the guarantees on bond issues exclusion.

The Linebacker policy excluded coverage for wrongful acts of an insured in connection with guarantees on bond issues:

P. Any "wrongful act" of an "insured" in connection with:

1. Any tax assessment or adjustments, or

2. The collection, refund, disbursement or application of any taxes, or

[19] Likewise, where an insured participates in the issuance of bonds in a manner that does not involve him making any assurances as to any particular outcome or condition, the guarantees on bonds exclusion would not exclude coverage. See Section II, B, *infra*.

3. Failure to anticipate tax revenue shortfalls.

4. Guarantees on bond issues.

Neither the phrase "guarantees on bond issues" nor the term "guarantee" is defined under the policy. Under Michigan law, when a policy term is undefined, courts apply the plain, commonly understood meaning of the term. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53-54; 723 NW2d 922, 924-25 (2006), citing *English v. Blue Cross Blue Shield of Michigan,* 263 Mich App 449, 471-472; 688 NW2d 523 (2004). To determine the ordinary meaning of a term, courts may refer to a dictionary. *Id.* at 472, 688 NW2d 523. Importantly, however, a word is not ambiguous simply because dictionary definitions differ. *Koontz v. Ameritech Services, Inc.,* 466 Mich 304, 317; 645 NW2d 34 (2002). The plain and ordinary meaning of the term guarantee, as defined in *Random House Webster's Unabridged Dictionary* (2nd ed 2001), is "something that assures a particular outcome or condition." Accordingly, plainly construed, the policy excludes coverage for a wrongful act of an insured in connection with a promise or assurance for the fulfillment of a condition or outcome on bond issues.

In this case, the circuit court properly concluded that there existed no genuine issue of material fact that liability was imposed on Helicon and Witucki as a result of their assurances as to the fulfillment of the financial viability of Crescent Academy and the Trusts' investment in the bonds. The Federal District Court concluded that Helicon and Witucki could be "sellers" under the Connecticut statute because they made representations in the Preliminary Official Statement and the Official Statement, as well as having personally made

statements to investors in meetings and telephone conferences, assuring the Trusts of the legality and safety of their bond investment in the school. Exhibit D. As such, there existed no coverage for the judgment imposed upon Helicon and Witucki as a result of the guarantees on bond issues exclusion.

The Trusts argued that the exclusion did not apply because the bonds issued in this case were not "guaranteed bonds." However, this argument is without merit as the exclusion does not use the term "guaranteed" or "guaranteed bonds" but, rather "guarantees" on bond issues. "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase." *McGrath v. Allstate Ins. Co,* 290 Mich. App 434, 439; 802 NW2d 619 (2010). "A court cannot remake a contract through construction ... to find a meaning not intended ...," nor can the court "read out ... words ... to reach the results" sought by a claimant. *Damerau v. Rieckhoff Co, Inc,* 155 Mich App 307, 312; 399 NW2d 502 (1986). Moreover, to accept the Trusts' argument would require this Court to construe the term "guarantees" as a specific type of bond or term of art in the financial world[20] - a construction prohibited by Michigan law. *Radenbaugh v. Farm Bureau Ins Co of Mich,* 240 Mich App 134, 138; 610 NW2d 272 (2000) (language should be given its ordinary and plain meaning, and technical and strained constructions should be avoided).

[20] The website Investopedia, defines "guaranteed bond" as "a debt security that offers a secondary guarantee that interest and principal payment will be made by a third party, should the issuer default due to reasons such as insolvency or bankruptcy. A guaranteed bond can be municipal or corporate, backed by a bond insurer, a fund or group entity, or a government authority." See http://www.investopedia.com/terms/g/guaranteedbond.asp#ixzz2Nd9G6sHH

Nothing in the language of the exclusion, or the policy in general, would support such a construction or departure from the plain, common understanding of the term "guarantees."

The circuit court correctly interpreted the exclusion under Michigan law and concluded that there existed no genuine issue of material fact that the liability imposed upon Helicon and Witucki by the Trusts in the underlying action was excluded from coverage as a wrongful act in connection with guarantees on bond issues. Summary disposition was warranted on this basis as well.

C. Although not a basis for the circuit court's decision, coverage for the liability imposed by the Trusts on Helicon and Witucki was also excluded under the return of remuneration exclusion.

The Linebacker Policy also excluded coverage for the return of any remuneration paid to an "insured" if such payment is held by the courts to be in violation of the law. Again, the term "remuneration" is undefined in the policy and, therefore must be given its plain, commonly understood meaning. *English, supra*. The plain and ordinary meaning of the term remunerate, as defined in *Random House Webster's Unabridged Dictionary* (2nd ed 2001), is to pay, recompense, or reward for work, trouble, etc. Accordingly, the exclusion operates to exclude coverage for the return of any payment, recompense or reward paid to an insured, if such payment is held by the courts to be in violation of the law.

Under the facts established in the underlying action, there existed no genuine issue of material fact that the judgment entered in favor of the Trusts against Helicon and Witucki was, at least in part, a return of money which was paid to Helicon and Witucki in violation of the Connecticut Securities Act. The Trusts established in the underlying action that the

proceeds from the bond issuance were used by Crescent to pay off the equipment leases to Helicon and to pay the fees charged by Helicon. See Closing Memo (attached as Exhibit 30 to the Trusts' summary judgment pleading in the District Court - see Exhibit B). Accordingly, the damages received by the Trusts in the underlying suit were, at least in part, a return of payment which had been improperly made to Helicon. Coverage was excluded under this exclusion as well.

RELIEF REQUESTED

Plaintiff-Appellee, Employers Mutual Casualty Company, respectfully requests that this Court deny the Trusts' application for leave to appeal from the Court of Appeals December 1, 2015 decision affirming the circuit court's decision granting summary disposition.

GARAN LUCOW MILLER, P.C.
Attorneys for Plaintiff-Appellee

/s/ Megan K. Cavanagh
MEGAN K. CAVANAGH (P61978)
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
Telephone: (313) 446-5549
Email: mcavanagh@garanlucow.com
P61978

Dated: February 10, 2016
1261140.1

LIST OF EXHIBITS

Exhibit AA	Court of Appeals Opinion
Exhibit A	Order Granting Plaintiff's Motion for Summary Disposition
Exhibit B	First Amended Complaint
Exhibit C	The Trusts' Brief in Opposition to Helicon's Motion for Summary Judgment
Exhibit D	Order Denying Helicon and Witucki's Motion for Summary Judgment
Exhibit E	Judgment and Order of Dismissal, dated April 25, 2012
Exhibit F	Order, dated November 20, 2012
Exhibit G	*Wells Fargo Advantage Natl Tax Free Fund v. Helicon*, 520 Fed Appx 367 (6th Cir. 2013)
Exhibit H	Stipulated Order Regarding Setoff and/or Reduction to Judgment Based upon any Settlement or Judgment Issued Against Dorsey & Whitney
Exhibit I	The Trusts' status report in which the parties jointly requested that the action be stayed pending resolution of the instant appeal
Exhibit J	Linebacker Policy
Exhibit K	Hearing Transcript, June 27, 2013
Exhibit L	Hearing Transcript, February 18, 2014
Exhibit M	*Unionville-Sebewaing Area Schools v MASB-SEG Property Casualty Pool, Inc*, unpublished per curiam opinion of the Court of Appeals (Docket No. 242084, January 29, 2004)
Exhibit N	*Yale Public Schools v MASB-SEG Property Casualty*, unpublished per curiam opinion of the Court of Appeals (Docket No. 250053, December 14, 2004)
Exhibit O	*Jarvis Christian College v National Union Fire Ins Co of Pittsburgh, Pennsylvania*, 197 F3d 742 (5th Cir 1999)
Exhibit P	*White v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals (Docket No. 265380, March 16, 2006)

STATE OF MICHIGAN
IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff/Counter-Defendant-Appellee,

Supreme Court 152994

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity as successor in interest to Michael J. Witucki, a deceased individual,

Court of Appeals No. 322215

Defendants/Counter-Plaintiffs,

Wayne County Circuit Court
Case No. 12 -002767-CK

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.

PROOF OF SERVICE

PROOF OF SERVICE

Proof of Service: I certify that a copy of **RESPONSE ON BEHALF OF PLAINTIFF-APPELLEE, EMPLOYERS MUTUAL CASUALTY COMPANY, TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**, with all attachments, and this **PROOF OF SERVICE** were served upon the following as indicated below:

Date of Service: February 10, 2016

Signature: /s/ Susan M. Westphal

Via TrueFiling E-File & Serve
Michael J. Watza (P38726)
Attorney for Defendants-Appellants
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
mike.watza@kitch.com

Via U.S. Mail
Scott W. Wilkinson, No. 36622
George R. Lyons, No. 46217
Co-Counsel for Defendants-Appellants
1350 17th Street, Suite 400
Denver, CO 80202-1581
swilkinson@davisandceriani.com
glyons@davisandceriani.com

Via U.S. Mail
Douglas Young (P43808)
Wilson Young PLC
Attorneys for Helicon and Witucki
One Woodward Ave, Suite 2000
Detroit, MI 48226
dyoung@wilsonyoungplc.com

Via TrueFiling E-File & Serve
Christopher A. Merritt (P70924)
RJ Landau Partners, PLC
Attorney for Dr. Charles Drew Academy
5340 Plymouth Road, Suite 200
Ann Arbor, MI 48105
cmerritt@rjlps.com

Via U.S. Mail
Jeremy Gilliam
Pro Se
20789 HCL Jackson
Grosse Ile, MI 48138
jgilliam@mtacademy.org

1261140.1